

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 15, 2008 Session

PREMIER GRAPHICS, INC., v. WESTERN EXPRESS, INC.

**Direct Appeal from the Chancery Court for Davidson County
No. 06-70-I Hon. Claudia C. Bonnyman, Chancellor**

No. M2007-02761-COA-R3-CV - Filed September 26, 2008

Plaintiff's action charged defendant with failure to deliver time-sensitive material, and sought damages. The Trial Court granted summary judgment on the issue of liability and submitted the issue of damages to a jury. The jury awarded damages and defendant has appealed raising issues as to liability, timely filing a claim, the measure of damages under the "Carmack Amendment", special damages, and insufficiency of evidence of damages. We affirm the Trial Court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which SHARON G. LEE, J., and ANDY D. BENNETT, J., joined.

Isham B. Bradley, Nashville, Tennessee, for Appellant, Western Express, Inc.

E. Steele Clayton, IV., and Russell S. Baldwin, Nashville, Tennessee, for Appellee, Premier Graphics, Inc.

OPINION

Plaintiff, Premier Graphics, Inc., brought this action against Intercon Systems, Inc., and Western Express, Inc., alleging that McQuiddy Printing, an unincorporated division of Premier, sustained damages when defendants failed to deliver time-sensitive printed materials that McQuiddy had printed for a third party. It was alleged that McQuiddy had printed 32,000 directories and 16,000 addenda to be used at a convention in New York on June 3-5, 2005. McQuiddy contracted with

Intercon for shipment of the materials from Nashville to New York, and Intercon contracted with Western for transportation. The materials were to be delivered on June 1, 2005, and it was alleged that McQuiddy contacted Intercon on June 2, 2005, to confirm that the delivery had been made, and was assured that it had.

Plaintiff averred that McQuiddy received a call later that day stating that one truckload of the materials had been delivered, but the second truckload had not arrived. McQuiddy contacted Intercon again later that day and early the next morning, and was assured both times that the entire shipment had been delivered.

Plaintiff asserted that late in the morning on June 3, 2005, Intercon informed McQuiddy that the second truckload had not been delivered, but in fact had just left Nashville and would not make it to New York until the following morning, which was the second day of the convention. Plaintiff asserted that Western later informed McQuiddy that the truck had broken down near Baileytown, Tennessee, and McQuiddy had to arrange to have part of the shipment offloaded and transported via air by Federal Express Custom Critical, at a cost of \$29,500.00. Further, that Western was to deliver the rest of the shipment by 5:00 a.m. on June 5, 2005, the last day of the convention, but the shipment did not arrive on time, and plaintiff suffered substantial financial losses, including the cost of the directories, cost of emergency airfreight services, lost profit, and damage to its reputation/goodwill.

Plaintiff concluded that since the shipment originated in one state and traveled through other states, it was subject to jurisdiction under 49 U.S.C. §13501 of the Interstate Commerce Act, and attached the bill of lading as an exhibit, and asserted that since the delivery was not made as set forth on the bill of lading, defendants were liable to plaintiff for its damages under 49 U.S.C. §14706. Plaintiff also charged claims of breach of contract, negligent misrepresentation, and fraudulent misrepresentation.

Western filed an Answer, denying liability. Intercon filed an Answer and Cross-Claim, and alleged that it was not a “motor carrier” as defined by 49 U.S.C. §13102, and thus was not subject to Carmack Amendment liability pursuant to 49 U.S.C. §14706. Intercon stated that it made no guarantees to plaintiff regarding delivery times, and that it did not make any misrepresentations. Intercon filed a cross-claim against Western, asserting that it contracted with Western to deliver the materials, and that Western had falsely represented to Intercon that the deliveries had been made, and then later recanted and said the deliveries were not made. Intercon sued for breach of contract, fraudulent misrepresentation, and negligent misrepresentation, and attached its contract with Western as an exhibit to the Cross-Claim. Western filed a Response to the Cross-Claim, and denied any negligence or liability, and then filed a Motion for Summary Judgment, asserting that plaintiff had failed to properly file a claim pursuant to federal law, and also plaintiff’s damages would be limited to the actual value of the cargo. Western attached various documents in support of its motion, and plaintiff responded that it had submitted a proper claim on October 10, 2005, and that special and consequential damages were recoverable under Carmack. Intercon responded that it was not required to file a claim, as the Carmack Amendment did not apply to

brokers, and thus its damages were also not limited under Carmack. The Court entered an Order denying summary judgment, finding that there were material issues of fact in dispute, including papers comprising the bill of lading.

Plaintiff then filed a Motion for Partial Summary Judgment, and Western responded that since the Court had already found that issues of fact existed, the motion should be denied. Western filed a Motion for Separate Trial, asking the Court to separate the claims filed by plaintiff against Western from the claims filed by Intercon against Western. Intercon then filed a Notice of Voluntary Dismissal as to its Cross-Claim against Western. Plaintiff also filed a Notice of Voluntary Dismissal regarding its claims of breach of contract and negligent misrepresentation against Western, and the Trial Court then entered an Order in response to the Motion for Partial Summary Judgment, and found that there was no dispute that Western was liable to plaintiff for its failure to timely deliver the materials in accordance with the bill of lading attached as an exhibit to plaintiff's memorandum in support of partial summary judgment. Thus, the Court granted summary judgment to plaintiff as to Western's liability on the Carmack claim, and reserved the issue of damages. Plaintiff then filed a Notice of Voluntary Dismissal regarding the claim of intentional misrepresentation against Western.

The trial was held on September 17 and 18, 2007, and following the trial, the jury returned a verdict, finding damages of \$61,578.00 against the defendant, with which the Trial Court agreed and entered Judgment.

Western has appealed and these issues are raised:

1. Whether the Trial Court was correct in determining as a matter of law that Western was liable to the plaintiff because of a late delivery?
2. Whether plaintiff filed a timely claim as required by federal law?
3. What is the proper measure of damages under the Carmack Amendment?
4. Whether the Court erred in failing to charge the jury that in order to recover special damages, the plaintiff had to specifically advise Western that it would be liable for such special damages?
5. Whether gratuitous payments are recoverable?
6. Whether it was possible for the jury to return the damages awarded based upon the evidence presented at trial?

Western argues the Trial Court erred in granting summary judgment on the issue of Western's liability for late delivery, when one of the bills of lading stated that the delivery date was 6/12 instead of 6/1, and argues that this creates a genuine issue of material fact which should have

precluded summary judgment.

The evidence at trial was that the bills of lading were prepared by McQuiddy and accepted by Western's drivers, and that one of the bills contained a typographical error which stated that the delivery date was 6/12 rather than 6/1. There was no question, however, that Western knew the target delivery date was actually 6/1, because this is the date which was listed on the rate quote confirmations, which the Western representative testified was what Western actually relied upon. At trial, there was no testimony whatsoever that anyone was confused by the typographical error on this bill of lading, or that there was any misunderstanding about the delivery date being 6/1. Moreover, the load with the bill of lading containing the incorrect delivery date was actually the load that made it to its destination. The load with the bill of lading containing the delivery date of 6/1 was the load that did not get delivered. Accordingly, there was no genuine issue of material fact, as the Trial Court properly found.

As the Sixth Circuit Court of Appeals has explained:

The 1906 Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. s 20(11), makes common carriers liable "for any loss, damage or injury" caused by such carriers to property received by them for transportation. The Supreme Court has construed the Carmack Amendment as follows:

(T)he statute codifies the common-law rule that a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by "(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods."

Missouri Pacific R. R. v. Elmore & Stahl, 377 U.S. 134, 137, 84 S. Ct. 1142, 1144, 12 L. Ed.2d 194 (1964) (citations omitted).

The Court dealt with the burden of proof in such cases as follows:

Accordingly, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability. *Id.* at 138, 84 S. Ct. at 1145 (citations omitted).

Plough, Inc., v. Mason & Dixon Lines, 630 F.2d 468, 470 (6th Cir. 1980).

Consequently, liability will attach for an unreasonable delay in the delivery of goods. As stated by the District Court of Maryland:

. . . although the Carmack Amendment refers to compensation for “loss or damage” to goods, it also allows for recovery for unreasonable delay in the delivery of goods, even if not lost or damaged. As stated in *Turner's Farms Incorporated v. Maine Central Railroad Company*, 486 F. Supp. 694, 697-98 (D. Me.1980):

The duty to transport goods with reasonable dispatch is “an integral part of the normal undertaking of the carrier.” A party injured by the carrier's breach of that duty is entitled to recover damages under the Carmack Amendment.

Richter v. North American Van Lines, 110 F. Supp. 2d 406, 412 (D. Md. 2000).

In this case, there was no real dispute that the goods in question were not timely delivered, and the Trial Court correctly granted summary judgment on the issue of liability.

Next, Western argues that Carmack liability does not attach unless the shipper files a claim consistent with 49 C.F.R. §1005.2, within the time limit specified in the bill of lading, if any such time limit was specified, and asserts that no such claim was filed in this case.

49 C.F.R. §1005.2 explains that a claim is sufficient if it is 1) in writing, 2) within the time specified in the bill of lading, if any, 3) the writing contains facts sufficient to identify the shipment of property, 4) the writing asserts liability for loss, damage, injury, or delay, and 5) the writing makes a claim for payment of a determinable amount of money. The federal courts have recognized that strict compliance with the requirements of the regulations is not essential, and that the purpose of the regulation is not to permit the carrier to avoid liability, but to insure that the carrier has enough information to begin processing the claim. *Trepel v. Roadway Exp. Inc.*, 194 F.3d 708 (6th Cir. 1999). The federal courts have also recognized that the claim requirements are very informal, and that the claim need only contain sufficient facts to identify the goods, assert liability, and ask for damages. *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538 (6th Cir. 1986).

In this case, plaintiff sent a letter on October 10, 2005, which complied with the requirements in the stated regulation. There was no time limit for such a claim stated in the bills of lading, so the claim was clearly timely. The written letter of October 10 from plaintiff's attorney to Western contains sufficient facts to identify the shipment, assert liability for late delivery/non-delivery, and demands compensation for same in a definite amount. The Trial Court held this letter to be sufficient, and this is correct, based on the above regulation and case law. This issue is without merit.

Western argues that Carmack liability is limited to the loss of the value of the goods, but a review of the authorities demonstrates otherwise. As stated, the courts have recognized that Carmack liability will attach not only for loss/damage to the goods, but also for an unreasonable delay in the delivery of goods, even if they are not ultimately lost/damaged. See *Richter*. The normal measure of damages when a carrier fails to timely deliver a shipment is the difference between the market value of the goods at the time of delivery, and the value of the goods at the time

when they should have been delivered. *Starmakers Publishing Corp. v. Acme Fast Freight, Inc.*, 615 F. Supp. 787 (D. N. Y. 1985).

Special damages are those damages which are not necessarily the ordinary and natural consequence of the untimely delivery, and are only recoverable when the carrier has reason to foresee at the time the contract was made that the particular loss was a probable result of untimely delivery. *Id*; see also *Burlington Air Express, Inc., v. Truck Air of the Carolinas, Inc.*, 8 F. Supp. 2d 508 (D. S. C. 1998). In this case, Western was on notice by McQuiddy that the materials being shipped were time-sensitive, and that they had to be delivered by the beginning of the show, which was stated on the bills of lading. Moreover, this information was also communicated orally to the drivers. The cases relied upon by the defendant involved situations where inadequate notice was given that the materials being shipped were time-sensitive, but such is not the case before us.

The evidence establishes that the value of the delayed shipment was zero, and that this cost was recoverable. The jury found, that it was foreseeable to Western that extraordinary measures might have to be taken to get the materials delivered on time if Western failed to do so. As we have stated, “[t]his Court on appeal is required to take the strongest legitimate view of the evidence favoring the prevailing party, discard all contrary evidence, allow all reasonable inferences to uphold the jury's verdict and set aside the jury verdict only when there is no material evidence to support it.” T.R.A.P. 13(d); *Estate of Glasgow v. Whittum*, 106 S.W.3d 25 (Tenn. Ct. App. 2002)(quoting *Witter v. Nesbit*, 878 S.W.2d 116, 121 (Tenn. Ct. App. 1993)). In this case, material evidence supports the jury’s verdict regarding damages suffered by the plaintiff.

Western argues the Trial Court failed to properly instruct the jury regarding special damages, but apparently the court reporter did not transcribe the Trial Court’s verbal charge to the jury. The technical record contains what purports to be pattern jury instructions given by the Court to the jury, and we assume the parties’ representation about what was contained in the charges is true. It is represented that the Trial Court did instruct the jury that special damages could only be awarded if defendant had reason to foresee that such damages might result from a breach at the time the contract was made. As this Court has previously explained:

We begin our review of the challenged jury instructions with the understanding that we do not measure a trial court's jury instruction against the standard of perfection. “Instead, we review the entire charge just as the jury would, and we will not invalidate it as long as it fairly defines the legal issues involved in the case and does not mislead the jury.” “Under Tennessee law the jury charge will be viewed in its entirety and considered as a whole in order to determine whether the trial judge committed prejudicial error.”

* * *

There is no reversible error if the instruction fairly submitted the applicable legal principles to the jury.

Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 319-21 (Tenn. Ct. App. 2006)(citations omitted).

The charge contained in the record properly explained the nature of special damages to the jury, and we find no error in this charge.

Similarly, the Trial Court did not err in failing to instruct the jury regarding gratuitous payments, as defendant asserted, because there was no proof of any such gratuitous payment in this case. Western argues that plaintiff gratuitously did not charge its customer for the directories, and that Western should thus not be held liable for such damages, but the proof was that McQuiddy's client refused to pay for the directories, not that McQuiddy simply decided not to bill for them. David McQuiddy testified that it was his understanding from talking with a representative of his client that the directories would not be paid for, and thus McQuiddy ultimately reversed the charges for same.

Finally, Western argues the jury must have engaged in some type of improper averaging or speculation in order to arrive at the damages figure. As plaintiff points out, however, there was somewhat confusing testimony regarding how many directories were ultimately printed and shipped, what arrived and what did not arrive, etc., such that the jury could have simply based its numbers on a figure other than what was presented in the damages exhibit, which could have come from testimony at trial. As stated, the jury's verdict is supported by material evidence, and we affirm the decision of the Trial Court.

The cost of the appeal is assessed to Western Express, Inc.

HERSCHEL PICKENS FRANKS, P.J.